United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

No. 74-1361

United States Court of Appeals

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1361

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review and Cross-Application for
Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record considered as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by threatening employees with discharge and other reprisals for supporting or assisting the Union, creating the impression that its employees' Union activities were under surveillance, coercively interrogating its employees concerning their Union activities and requiring employees to report to the Company on their Union activities.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of Allstate Insurance Company ("the Company") to review and set aside an order (A. 64-65, 71-72)[1] of the National Labor Relations Board issued on March 12, 1974, and reported at 209 NLRB No. 68. The Board has filed a cross-application for enforcement of its order. This Court has jurisdiction under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), the unfair labor practices having occurred in Long Island, New York, within this judicial circuit, where the Company, which is engaged in the sale of insurance, maintains branch offices (A. 19).

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by threatening employees with discharge and other reprisals for supporting or assisting the Union,[2] creating the impression that its employees' Union activities were under surveillance, coercively interrogating its employees concerning their Union activities and requiring employees to report to the Company on their Union activities. The facts on which the Board based its findings are set forth below.

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[1] "A." refers to the portions of the record printed as an appendix to the parties' briefs. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The Union is Local 365, United Automobile, Aerospace and Agricultural Implement Workers of America, International Union.

A. Background; the Company opposes the unionization of its employees

As stated, the Company maintains some eight branch offices on Long Island. The offices are headed by John Cartiglia, who has the title of Regional Claims Manager (A. 20; 257). The Company's policy is one of opposition to the organization of its employees and Cartiglia and a number of other Company officials are also personally opposed to unionism (A. 20; 176, 211, 226, 252).

All management personnel are required to and do report promptly to the Company any incidents or events involving employee organizational activities which come to their attention (A. 20; 175, 179-181, 213-214, 227-228, 229, 277, 284-285, 295-296, 298-299, 308, 315). Information which the Company acquires concerning organizing activities is routinely disseminated to and exchanged by all of the Company's various representatives (A. 20; 164-165, 173, 186-188, 226-228, 231-233, 306-307, 312).

In the first week of October 1971, Cartiglia began to receive reports from his division claim managers of employee "unrest" and of the organizing activities of another union called the American Communications Association, which is affiliated with the Teamsters Union (A.C.A.) (A. 21; 277, 315-316). As a result, Cartiglia drafted and circulated to all Long Island employees a letter dated October 5, 1971, which was critical of the A.C.A. and urged employees not to sign authorization cards on its behalf, stating, "I am sure you neither want or need that and I don't either" (A. 21; 87-88, 176, 189, 251, 276-283, 326-327). The letter concluded *(ibid.)*:

> This is too important for us to stand idly by and let well intentioned but mis-directed Allstate people be led by the ACA and their Teamster affiliates. If we have problems, let's talk about them and arrive at an equitable solution

> without a union with only their own ends to serve. I will visit each of our claim offices in the next few days for this purpose. Your manager will let you know when.

Immediately thereafter and continuing through November, Cartiglia for the first time visited all eight Long Island offices and spoke in groups to some 850 persons (A. 21; 99, 177, 276, 287, 289). The meetings were held on work time and attendance was compulsory (A. 291-292). At the meetings, Cartiglia invited the employees to "discuss" with him their "problems." Cartiglia wrote down on paper the employees' suggestions and if "they presented a problem that [Cartiglia] could solve, [Cartiglia] attempted to solve it" (A. 21; 90-94, 99-102, 167, 177-178, 188-190, 230-231, 253-255, 258-260, 274-276, 317-320).

In November 1971, the Union began organizing activities among the Long Island employees (A. 21-22; 76-77). In February 1972, a group of employees with the Union's help drafted a letter to "fellow Allstate employees," stating their preference for the Union over the A.C.A.[3] In March 1972, Cartiglia sent a second letter to all of the employees. The letter referred to the prior organizing campaign of the A.C.A. and Cartiglia's visits to the branch offices and stated that Cartiglia felt that "we reached a good understanding" (A. 22, n. 4; 95, 251, 287, 301-302, 328-329). The letter then noted the Union's current organizing efforts and said *(ibid.)*:

> I will repeat what I said in my October letter – that you have the legal right to sign a card authorizing a Union to bargain for you. You also have the legal right *not to sign* a card which by signing could mean giving up your rights forever to speak directly to our company on your personal

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[3] This letter was not actually sent until May or June (A. 22, n. 4; 77-78, 321-322).

> wages, hours, and working conditions. In my opinion, we don't need this disruption which can only cause problems and create distrust among us. I hope you agree with me.

Nonetheless, Union organizing efforts continued and Union meetings were held on May 4 or 5, June 5 and August 3, 1972. Employees were notified of these meetings by letters to their homes. Also during this period, the Union obtained authorization cards from a number of employees (A. 22; 79-84, 323-325).

B. Interference, restraint and coercion

Employee Edgar Hansen signed an authorization card for the Union on April 14, 1972, and thereafter attended and spoke at each of the meetings in May, June and August (A. 22-23, 25; 84-86, 111-112, 333). The day after the May meeting, Hansen was asked by unit manager Richard Hicks, "how did the meeting go last night?" (A. 23, n. 5; 104, 126-128, 160).

Following the June 5 meeting, Hansen went to the East Bay Diner in Belmore where he met Edwin Fowler, at that time the district claim manager for the Hollis office. Fowler had formerly been a manager of Hansen in the Baldwin office. Hansen told Fowler that he had just come back from the Union meeting. Fowler said, "you know, the Company knows who is going to these meetings and as soon as the Union folds their tent everybody is going to be fired" (A. 22; 105, 128, 168).

The next day Hansen went to his office. There, he encountered Manager Hicks who asked him, "who was at the meeting last night," and, "how did the meeting go," adding that, "we know who was there." Hansen asked how Hicks found out about the meeting and Hicks again said, "we know" (A. 23; 103-104, 126-128).

Around the end of July, Hansen was having lunch at Nathan's Restaurant in Oceanside, when Fowler and Unit Manager Vito Lostella appeared. Hansen had in his hands a copy of the Union's flyer announcing the forthcoming August 3 meeting. Fowler asked Hansen if he was "going to attend it," and Hansen said he did not know (A. 23; 106-107, 129-132, 170, 325). When Fowler returned to the office that afternoon, he reported his conversation with Hansen to Cartiglia, who in turn notified District Manager Donald Belger. Belger then advised Unit Manager Lawrence Deaner, Hansen's immediate supervisor (A. 24; 171, 197, 299-300).

During that same afternoon, Hansen received a message to call Unit Manager Deaner. Hansen telephoned Deaner who asked him where he had had lunch and with whom. Hansen told him and Deaner asked what they discussed. Hansen asked if Deaner was referring to the Union. Deaner explained how he had learned about the Union meeting through Fowler, Cartiglia and Belger and complained that Hansen had not told him about it directly, saying, "who the hell are you working for, Eddy Fowler or Don Belger and me?" Deaner then said that Hansen w. the "only man driving around . . . in the Company car," that his job was on the "outside" and a "plum job," and that "if you are going to be with the Union, you [can] forget about this" (A. 24; 108-109, 132-135, 193, 197, 200-201).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board in agreement with the Administrative Law Judge found that the Company violated Section 8(a)(1) of the Act by threatening employees with discharge and other reprisals for supporting or assisting the Union, creating the impression

that its employees' Union activities were under surveillance, coercively interrogating its employees concerning their Union activities and requiring employees to report to the Company on their Union activities (A. 22-24, 58).[4]

The Board's order requires the Company to cease and desist from the unfair labor practices found and from "in any like or related manner" infringing upon its employees Section 7 rights. Affirmatively, the Company is directed to post appropriate notices (A. 64-65, 71-72).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING EMPLOYEES WITH DISCHARGE AND OTHER REPRISALS FOR SUPPORTING OR ASSISTING THE UNION, CREATING THE IMPRESSION THAT ITS EMPLOYEES' UNION ACTIVITIES WERE UNDER SURVEILLANCE, COERCIVELY INTERROGATING ITS EMPLOYEES CONCERNING THEIR UNION ACTIVITIES AND REQUIRING EMPLOYEES TO REPORT TO THE COMPANY ON THEIR UNION ACTIVITIES

As the facts set forth *supra*, pp. 3-5, show, the Company was at all times strongly opposed to the unionization of its employees. Furthermore, its policy of opposition was not limited merely to a statement to that effect. The policy included both an elaborate system for detection

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[4] Reversing the Administrative Law Judge, the Board dismissed the Complaint's allegation that the Company's discharge of employee Hansen was violative of Section 8(a)(3) and (1) of the Act (A. 58-64). Member Kennedy concurred in the Board's rejection of the Complaint's Section 8(a)(3) allegation but would have reversed the Administrative Law Judge's finding of Section 8(a)(1) violations as well on the ground that it was based solely on the uncorroborated testimony of employee Hansen and Hansen's testimony was, in his view, inconsistent and contradictory on other issues and thus insufficient to support any findings (A. 70).

and reporting of its employees' organizational activities and illegal actions designed to defeat or thwart those activities.

Thus, in a prior organizing campaign in the Fall of 1971 involving a different Union, Company Regional Claims Manager Cartiglia – apparently the highest ranking Company official in the area – upon learning about such activities through the reports of his managers immediately wrote a letter to all the employees urging the employees to reject the Union. Cartiglia followed up the letter with unprecedented personal visits to each of the eight branch offices in the course of which he asked all of the employees to tell him what their grievances were that were causing the employees to seek union representation. Then, in Cartiglia's words, if the employees "presented a problem that I could solve, I attempted to solve it" (*supra*, p. 4). Since Cartiglia's attempts to remedy the employees' grievances were, by his own admission (A. 258, 274), prompted solely by the advent of the Union, his actions were plainly unlawful. *N.L.R.B. v. Rollins Telecasting, Inc.*, 494 F.2d 80, 83-84 (C.A. 2, 1974). While these incidents occurred more than six months before the filing of the charge in this case and are therefore outside the scope of the complaint, see Section 10(b) of the Act, it is well-settled that the Board may consider them as relevant background evidence in assessing the significance of acts committed within six months of the charge and alleged to be unlawful. *N.L.R.B. v. Lundy Manufacturing Corporation*, 316 F.2d 921, 927 (C.A. 2, 1963), cert. den., 375 U.S. 895; *N.L.R.B. v. National Shoes*, 208 F.2d 688, 692 (C.A. 2, 1953).

The evidence set out *supra*, pp. 5-6, makes clear that the Company's firm policy of opposition to unionism persisted during the campaign of the present Union and included further illegal acts. Thus, in March 1972, even before the Union publicized its efforts to organize the Company's employees, Cartiglia learned of the Union's actions, apparently through the Company's reporting system, and sent all of the

employees a second letter, reminding them of his previous unlawful attempts to remedy their grievances and reiterating his opposition to unionism.

Thereafter, as each Union meeting was held, Company officials engaged in a series of actions designed to discourage employee participation. After the June 5 meeting, District Claim Manager Fowler told employee Hansen, "you know, the Company knows who is going to these meetings and as soon as the Union folds their tent everybody is going to be fired" (*supra*, p. 5). Shortly before the August 3 meeting, Unit Manager Deaner told Hansen that he could "forget" about his "plum job" if he was "going to be with the Union" (*supra*, p. 6). These threats of discharge and loss of job advantages for supporting the Union are, as the Board found (A. 22-23, 24), unquestionably unlawful. *N.L.R.B. v. Scoler's Incorporated*, 466 F.2d 1289, 1292 (C.A. 2, 1972); *Snyder Tank Corp. v. N.L.R.B.*, 428 F.2d 1348, 1350 (C.A. 2, 1970), cert. den., 400 U.S. 1021.

In addition, Fowler's assertion in his June 5 conversation that "the Company knows who is going to these meetings," and Manager Hicks' twice repeated statement to Hansen the next day that "we know who was there" (*supra*, p. 5), clearly convey the impression that the Company was maintaining surveillance over the meetings and those attending. Such statements are also unlawful. *N.L.R.B. v. Long Island Airport Limousine Serv. Corp.*, 468 F.2d 292, 297 (C.A. 2, 1972); *N.L.R.B. v. Scoler's Incorporated, supra*, 466 F.2d at 1292.

Similarly, after the June 5 meeting Hicks asked Hansen in the office "who was at the meeting last night," and "how did the meeting go?" Shortly before the August 3 meeting Fowler asked Hansen in a restaurant whether he was "going to attend" the meeting, while unit Manager Deaner a few hours later also asked Hansen about the contents of his conversation with Fowler (*supra*, pp. 5, 6). The Company does not

suggest nor does the record disclose any lawful purpose for these questions. In fact, it appears that the questions were part of the Company's well-organized system for gathering information about its employees' union activities, for in the case of Fowler's inquiry Fowler immediately reported the incident to Cartiglia. Further, Hicks accompanied his questions with, as we have shown, illegal statements implying surveillance of the employees' meetings. Considering also the background of strong Company opposition to the employees' Union activities, we submit that in these circumstances the Board was amply justified in finding these interrogations coercive and therefore violative of Section 8(a)(1) of the Act. *N.L.R.B. v. Long Island Airport Limousine Serv. Corp., supra,* 468 F.2d at 296-297; *N.L.R.B. v. Scoler's Incorporated, supra,* 466 F.2d at 1291; *N.L.R.B. v. Gladding Keystone Corp.*, 435 F.2d 129, 132-133 (C. A. 2, 1970).

Finally, Deaner in his late July conversation with Hansen berated Hansen for telling Fowler but not him about Hansen's possible attendance at the forthcoming Union meeting, saying, "who the hell are you working for, Eddy Fowler or Don Belger and me?" (*supra,* p. 6). Deaner admitted on cross-examination that the reason for his complaint was because he "wanted to be informed from my own people as to anything relevant to my unit rather than hearing it from someone outside of my office" (A. 24; 201). Clearly, then, Deaner's statement was, as the Board found (A. 24), an attempt on Deaner's part "to require employees to report on union meetings and activities . . . ." As such, it was plainly illegal. *Edward Fields, Inc. v. N.L.R.B.*, 325 F.2d 754, 759 (C.A. 2, 1963).

The Company contends that the Board should not have credited the testimony of employee Hansen, on which the Board based its findings of unfair labor practices, over the contrary testimony of its witnesses.

According to the Company, since the Board discredited Hansen's testimony with respect to certain matters relating to his discharge, the Board should have found Hansen to be an unreliable witness in all respects (Br. 16-20). The Board, however, committed no error in refusing to discredit Hansen *in toto*. "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *N.L.R.B. v. Universal Camera Corp.*, 179 F.2d 749, 754 (C.A. 2, 1950) (per L. Hand), remanded on other grounds, 340 U.S. 474 (1951). Accord: *N.L.R.B. v. Izzi*, 395 F.2d 241, 244 (C.A. 1, 1968); *N.L.R.B. v. Carpenters, Local 517 (Gil Wyner)*, 230 F.2d 256, 259 (C.A. 1, 1956); *Champion Papers, Inc. (Ohio Division) v. N.L.R.B.*, 393 F.2d 388, 394 (C.A. 6, 1968); *Lozano Enterprises v. N.L.R.B.*, 327 F.2d 814, 816, n. 2 (C.A. 9, 1964); *Pioneer Drilling Co. v. N.L.R.B.*, 391 F.2d 961, 964, n. 3 (C.A. 10, 1968). And the fact that Hansen's testimony was not corroborated by the testimony of other witnesses affords no additional ground for rejecting his testimony. See 3A Wigmore §1008 *et seq.*, especially §§1011, 1012.

Nor, contrary to the Company (Br. 21-24), did the Administrative Law Judge and the Board fail to explain why Hansen's testimony was credited over that of the Company's witnesses. Both the Judge (A. 19) and the Board (A. 58) indicated that the Judge's decision, affirmed by the Board, to credit Hansen was based essentially on her "observation" of the witnesses. This Court has repeatedly held that it will not overturn a finding based on "demeanor . . . unless on its face it is hopelessly incredible . . . or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony. . . ." *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484, 490 (C.A. 2, 1952). Accord: *N.L.R.B. v. Marcus Trucking Co.*, 286 F.2d 583, 589-590 (C.A. 2, 1961); *N.L.R.B. v. Local 485, Int. U. of Electrical, R. & M. Wkrs.*, 454 F.2d 17, 20 (C.A. 2, 1972).

There can be no real dispute that Hansen's testimony readily satisfies this test. Not only is his testimony not on its face incredible but it is in fact wholly consistent with the other facts in the case. Thus, as we have already shown, the Company was admittedly opposed to the Union, maintained a constant watch over its employees' organizational activities, transmitted whatever information it acquired about such activities to all of its officials and committed a clear and serious violation of the Act in the Union campaign just prior to the one in issue here. In these circumstances, it does not appear at all unlikely that the Company, as Hansen testified, would interrogate him about his Union activites, boast that it "knows" who was attending Union meetings and threaten its employees with reprisals. Moreover, as we have shown, *supra*, p. 10, Hansen's testimony concerning Deaner's attempt to require him to report on his Union activities was confirmed by Deaner's own testimony. And, as the Judge noted (A. 23-24), Company witnesses Fowler and Lostella contradicted each other with respect to whether at their late July meeting (*supra*, p. 6) Hansen asked how the Union could obtain the names and addresses of the employees. See A. 170-171, 185-186. Accordingly, we submit that the Board was amply justified in crediting Hansen's testimony in these instances even though it rejected it in others, and that the Board's conclusion is entitled to acceptance by this Court.

CONCLUSION

For the foregoing reasons we respectfully request that the petition for review be denied and that a judgment be entered enforcing the Board's order in full.

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July, 1974.

UNITED STATES COURT OF APPEALS

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	)	
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	)	
Respondent.	)	
	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.

this 18th day of July, 1974